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# Yue Chi Kin v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-42(S)-137–12 OF 2015
MOHD NAZLAN J
20 MAY 2019

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*Criminal Procedure — Charge — Defective charge — Accused (external auditor) was charged with abetting company in making misleading statement in its annual report and financial statements to stock exchange — Charge against accused did not follow description of principal charge in s 122B of the Securities Industry Act 1983 — Whether principal charge not an offence known to law — Whether accused could not be convicted of abetting commission of non-existent charge — Whether principal charge against company deficient in that prosecution had not shown that board of directors knew of presence of misleading statement when they approved annual report and financial statements for submission to stock exchange — Whether accused's conviction for abetment unsustainable — Whether trial court's judgment substantially copied prosecution's submissions without independently analysing the facts, evidence and applicable law — Securities Industry Act 1983 ss 122B(b)(bb), 122C(c)*

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The sessions court had convicted and sentenced the appellant ('Yue') to a year's jail and fined him RM400,000 in default six months' jail for abetting a company ('ULC') in making' a misleading statement in its annual report and financial statements to the stock exchange, Bursa Malaysia Securities Bhd ('Bursa Malaysia'). Yue's offence fell under s 122B(b)(bb) read together with s 122C(c) of the Securities Industry Act 1983 ('the SIA'). The English version of the charge stated that Yue had abetted ULC which had 'knowingly permitted' the making of the misleading statement — namely, that the ULC Group had made a pre-tax profit of RM18,909,167 (when, in fact, the actual figure was lower by RM4m) — in ULC's annual report and financial statements for the year ended 31 December 2004 to Bursa Malaysia. The prosecution alleged that Yue, an accountant and external auditor for the ULC Group, had intentionally committed the offence but Yue denied he had any knowledge of the RM4m error. A main ground in his instant appeal against conviction and sentence was that he was gravely prejudiced by the defect in the Bahasa Malaysia ('BM') version of the charge against him which stated that ULC had 'knowingly made' the misleading statement to Bursa Malaysia whereas the English version of the charge stated that ULC had 'knowingly permitted' the making of the misleading statement. Yue said the BM version of the charge did not describe the charge as stated in s 122B(b) which required the principal offender to have 'knowingly authorised or permitted the making or

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furnishing of any false or misleading statement …'. Yue submitted that since the charge in the BM version referred to a non-existent offence, he could not be convicted of abetting the same. Yue contended that although he had pointed out the defect in the BM version of the charge to the prosecution even before the trial commenced, the prosecution did nothing to rectify the matter but continued to prosecute its case based on the defective charge. Yue also submitted that the trial court totally failed to judicially appreciate the evidence and the law and the court's judgment had substantially copied the submissions of the respondent without displaying any independent analysis of its own. The prosecution replied that Yue was not prejudiced, misled or embarrassed by any defect in the BM version of the charge because the English version had used the words of the offence in s 122B(b) and, in any event, any defect in the BM version was curable under s 156 of the Criminal Procedure Code.

**Held**, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging Yue of the charge:

(1) Yue's conviction and sentence were unsustainable. The charge in BM was defective for not including a key ingredient of the offence under s 122B of the SIA. There was also no evidence that the members of the board of directors of ULC, save for DW2, knew of the existence of the misleading statement when they approved the annual report and financial statements for submission to Bursa Malaysia (see para 188).

(2) The BM version of the charge against Yue failed to contain the translation of the words 'permitted' or 'authorised' which were clearly the ingredients of the offence under s 122B(b) of the SIA. The words 'secara sedar membuat' were not the same as 'knowingly permitted or authorised'. The BM version of the charge was a pre-requisite to any prosecution in view of the requirements of the mandatory provisions of art 152 of the Federal Constitution and s 8 of the National Language Acts 1963/1967. The omission to include the requisite words in the BM version of the charge was all the more objectionable and puzzling because Yue had pointed out the defect in the charge several times — when the prosecution amended the BM charge and also in his written submissions filed at the end of the prosecution's case and again at the end of the trial. Yet, this issue of the defective BM version of the charge was never addressed by the trial court in its grounds of judgment (see paras 55–60).

(3) As an essential ingredient of the offence was omitted from the BM version of the charge, Yue was misled, prejudiced and confused because the defence had to deal with different versions of what was supposed to have been the one and the same charge. This was fatal to Yue's conviction. The argument that the defect in the BM version was curable under s 156 of the CPC was unsustainable. Yue had made known the defect in the BM version of the charge before the trial commenced and again when the

BM version was amended, yet the prosecution continued to prosecute its case based on the BM version of the charge (see paras 63–69, 71 & 74).

(4) The mens rea for the principal offence under s 122B had not been proven against ULC. There was no evidence that all the nine directors in ULC had the requisite knowledge of the misleading statement when they deliberated and approved the annual report and financial statements of the company for submission to Bursa Malaysia. Merely because ULC's managing director cum CEO (DW2) had paid the compound for the offence to the Securities Commission did not amount to an admission of guilt by the company. The decision to approve the report and financial statements and send them to Bursa Malaysia was made by the entire board of directors (as required by the Companies Act and the Main Board Listing Requirements) and not by DW2 alone. Hence, the charge that Yue had abetted ULC in the commission of the s 122B offence could not be sustained (see paras 75, 82, 84–86, 113 & 127).

(5) The non-speaking judgment of the trial court contained very little judicial analysis and revealed considerable failure to appreciate the facts, evidence and the applicable law. The judgment primarily adopted/copied the written submissions of the prosecution. The situation justified appellate intervention (see paras 151, 153 & 189).

(6) The trial court's invocation of s 122(1) of the SIA against Yue caused him substantial prejudice and a miscarriage of justice. Section 122(1) was totally irrelevant to the proceedings because that section only applied to directors and officers of a company who were deemed to have committed the offence which the company had committed. An auditor, such as Yue, could not come within the remit of s 122(1). The wrong invocation of s 122(1) imposed on Yue the onus of disproving on balance of probabilities the presumption that was triggered against him by that section (see paras 155–156 & 158).

(7) The trial court's failure to initiate impeachment proceedings against the main witness for the prosecution, PW12, was untenable while the impeachment of the defence witness DW5 was erroneous. On the totality of the evidence, Yue's conviction was unsafe (see paras 162–187).

**[Bahasa Malaysia summary**

Mahkamah sesyen telah mensabitkan dan menjatuhkan hukuman penjara kepada perayu ('Yue') selama setahun dan denda RM400,000 sekiranya ingkar penjara enam bulan kerana bersubahat dengan syarikat ('ULC') dalam membuat pernyataan yang mengelirukan dalam laporan tahunannya dan penyata kewangan kepada bursa saham, Bursa Malaysia Securities Bhd ('Bursa Malaysia'). Kesalahan Yue tertakluk di bawah s 122B(b)(bb) yang dibaca bersama dengan s 122C(c) Akta Perindustrian Sekuriti 1983 ('APS'). Pertuduhan versi Bahasa Inggeris telah menyatakan bahawa Yue telah

bersubahat dengan ULC yang telah 'secara sengaja membenarkan' membuat pernyataan yang mengelirukan tersebut — iaitu, bahawa Kumpulan ULC telah memperoleh keuntungan sebelum cukai sebanyak RM18,909,167 (yang mana, sebenarnya, angka tersebut lebih rendah sebanyak RM4 juta) — dalam laporan tahunan dan penyata kewangan ULC untuk tempoh tahun berakhir 31 Disember 2004 kepada Bursa Malaysia. Pihak pendakwaan mendakwa bahawa Yue, seorang akauntan dan juruaudit yang dilantik bagi Kumpulan ULC, dengan sengaja melakukan kesalahan tersebut namun dinafikan Yue bahawa beliau mempunyai pengetahuan mengenai kesilapan RM4 juta tersebut. Alasan utama dalam rayuan semasa terhadap sabitan dan hukuman adalah bahawa beliau telah diprejudiskan dengan teruk terhadap kesilapan dalam versi Bahasa Malaysia ('BM') pertuduhan terhadap beliau yang menyatakan bahawa ULC telah 'secara sengaja' membuat pernyataan yang mengelirukan kepada Bursa Malaysia sedangkan versi pertuduhan dalam bahasa Inggeris menyatakan bahawa ULC telah 'secara sengaja mengizinkan' pembuatan pernyataan yang mengelirukan tersebut. Yue mengatakan versi BM pertuduhan tersebut tidak meyatakan pertuduhan seperti yang tertakluk dalam s 122B(b) yang mengharuskan pelaku utama 'dengan sengaja mengizinkan atau memberi kebenaran pembuatan atau penyediaan pernyataan yang salah atau mengelirukan …'. Yue mengemukakan bahawa oleh kerana pertuduhan dalam versi BM merujuk kepada kesalahan yang tidak wujud, beliau tidak boleh disabitkan bersubahat dengan perkara yang sama. Yue berpendapat bahawa walaupun beliau telah menunjukkan kecacatan pertuduhan versi BM kepada pihak pendakwaan bahkan sebelum perbicaraan bermula, pihak pendakwaan tidak membuat sebarang pembetulan terhadapnya tetapi meneruskan kes berdasarkan pertuduhan yang cacat. Yue juga mengemukakan bahawa mahkamah perbicaraan gagal sepenuhnya untuk menilai bukti dan undang-undang dan penghakiman mahkamah telah secara nyata menyalin hujahan responden tanpa mengemukakan analisis sendiri. Pihak pendakwaan menjawab bahawa Yue diprejudiskan dengan teruk, dikelirukan atau dimalukan dengan sebarang kecacatan dalam pertuduhan versi BM kerana versi bahasa Inggeris telah menggunakan ayat-ayat kesalahan di bahawa s 122B(b) dan, dalam apa jua keadaan, sebarang kecacatan dalam BM versi dapat dibaiki di bawah s 156 Kanun Tatacara Jenayah.

**Diputuskan**, membenarkan rayuan, mengetepikan sabitan dan hukuman serta membebaskan dan melepaskan Yue atas pertuduhan:

(1) Sabitan dan hukuman Yue tidak dapat dikekalkan. Petruduhan dalam BM cacat kerana tidak memasukkan unsur utama kesalahan di bawah s 122B APS. Tidak ada keterangan bahawa anggota lembaga pengarah ULC, kecuali DW2, mengetahui wujudnya penyataan yang mengelirukan ketika mereka meluluskan laporan tahunan dan penyata kewangan untuk diserahkan kepada Bursa Malaysia (lihat perenggan 188).

(2) Versi BM pertuduhan terhadap Yue gagal memuatkan penterjemahan perkataan 'diizinkan' atau 'dibenarkan' yang jelas merupakan unsur kesalahan di bawah s 122B(b) APS. Perkataan 'secara sedar membuat' tidak sama dengan 'mengetahui diizinkan atau dibenarkan' Versi BM pertuduhan tersebut adalah prasyarat bagi setiap pendakwaan berdasarkan kepada unsur-unsur mandatori peruntukan perkara 152 Perlembagaan Persekutuan dan s 8 Akta Bahasa Kebangsaan 1963/1967. Kelalaian untuk memasukkan kata-kata yang wajib dalam versi BM pertuduhan tersebut adalah tidak bersesuaian dan menelirukan kerana Yue telah membangkitkan kecacatan pertuduhan tersebut beberapa kali — apabila pihak pendakwaan meminda pertuduhan BM dan juga dalam hujahan bertulisnya yang difailkan di akhir kes pendakwaan dan sekali lagi pada akhir perbicaraan. Namun, isu pertuduhan versi BM yang cacat ini tidak pernah diputuskan oleh mahkamah perbicaraan dalam alasan penghakimannya (lihat perenggan 55–60).

(3) Oleh kerana unsur penting kesalahan tersebut telah dikeluarkan dari versi BM pertuduhan tersebut, Yue telah dipesongkan, diprejudiskan dan dikelirukan kerana pihak pembelaan harus mengguna pakai dua versi yang berbeza walaupun seharusnya pertuduhan tersebut adalah satu dan sama. Ini adalah memberikan kesan terhadap sabitan Yue. Hujahan bahawa kecacatan dalam versi BM dapat dibaiki di bawah s 156 CPC tidak dapat dipertahankan. Yue telah menyatakan kecacatan dalam versi BM pertuduhan tersebut sebelum perbicaraan dimulakan dan sekali lagi ketika versi BM dipinda, namun pihak pendakwaan meneruskan kesnya berdasarkan versi BM pertuduhan tersebut (lihat perenggan 63–69, 71 & 74).

(4) Mens rea untuk kesalahan utama di bawah s 122B tidak dapat terhadap ULC. Tidak ada bukti bahawa kesemua sembilan pengarah di ULC memiliki pengetahuan yang mencukupi mengenai pernyataan yang mengelirukan ketika mereka dengan sengaja dan meluluskan laporan tahunan dan penyata kewangan syarikat untuk diserahkan kepada Bursa Malaysia. Hanya kerana pengarah urusan ULC merangkap CEO (DW2) telah membayar kompaun untuk kesalahan itu kepada Suruhanjaya Sekuriti bukanlah suatu pengakuan bersalah syarikat tersebut. Keputusan untuk meluluskan laporan dan penyata kewangan dan menyerahkannya ke Bursa Malaysia dibuat oleh kesemua ahli lembaga pengarah (seperti yang diperuntukkan oleh Akta Syarikat dan Main Board Listing Requirements) dan bukan oleh DW2 sahaja. Oleh itu, pertuduhan bahawa Yue bersubahat dengan ULC dalam melakukan kesalahan s 122B tidak dapat dipertahankan (lihat perenggan 75, 82, 84–86, 127 & 113).

(5) Penghakiman bertulis oleh mahkamah perbicaraan mengandung sedikit analisa kehakiman dan mendedahkan beberapa kekhilafan untuk menilai

fakta, keterangan dan nas undang-undang. Penghakiman tersebut hanya mengguna pakai/menyalin penghujahan bertulis pendakwaan secara keseluruhan. Situasi tersebut membenarkan campur tangan mahkamah rayuan (lihat perenggan 151, 153 & 189).

(6) Mahkamah perbicaraan dengan mengguna pakai s 122(1) APS terhadap Yue telah memprejudiskan beliau dan menyebabkan ketidakadilan. Seksyen 122(1) sama sekali tidak relevan dalam prosiding tersebut kerana seksyen tersebut hanyalah untuk pengarah dan pegawai sebuah syarikat yang didakwa telah melakukan kesalahan yang telah dilakukan oleh syarikat. Juruaudit, seperti Yue, tidak termasuk dalam s 122(1). Penyalahgunaan s 122(1) terhadap Yue telah mengenakan onus dalam menyangkal imbangan kebarangkalian anggapan yang diterapkan terhadapnya oleh seksyen tersebut (lihat perenggan 155–156 & 158).

(7) Kekhilafan mahkamah perbicaraan untuk memulai prosiding mencabar kredibilit terhadap saksi utama pendakwaan, PW12, tidak dapat dipertahankan sementara prosiding mencabar kredibiliti saksi pembelaan DW5 adalah terkhilad. Berdasarkan keseluruhan bukti, sabitan Yue tidak dikekalkan (lihat perenggan 162–187).]

**Cases referred to**

*CGU Insurance Berhad v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1, CA (refd)

*Chukwudi Okonkwo v Public Prosecutor* [2018] MLJU 93, CA (refd)

*Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444, CA (refd)

*Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577, FC (folld)

*Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1; [1998] 3 CLJ 184, CA (refd)

*Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131; [2012] 7 CLJ 407, HC (refd)

*Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122 (refd)

*Mohd Nazri bin Ismail v Public Prosecutor* [2015] 1 MLJ 319, CA (refd)

*Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875, CA (refd)

*Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 (refd)

*Pathmanabhan a/l Nalliannen & Ors v Public Prosecutor* [2013] 5 MLJ 867, HC (refd)

*Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187, CA (folld)

*P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, CA (refd)

*Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421, FC (refd)

*Safry bin Koboy & Anor v Public Prosecutor* [2000] 1 MLJ 656, HC (refd)

*Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; [2013] 4 CLJ 470, CA (refd)
*University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd* [1975] 133 CR 1, HC (refd)
*Wee Swee Hoon, Re; Lim Ah Moy & Anor v Ong Eng Say* [1953] 1 MLJ 123 (refd)
*Yusoff bin Sidin v Public Prosecutor* [1971] 1 MLJ 203, HC (refd)
*Zulkiflee bin Mohd Dom v Public Prosecutor* [1997] 4 MLJ 161; [1997] 3 CLJ Supp 290, HC (refd)

**Legislation referred to**

Capital Markets and Services Act 2007 ss 320A, 367, 369
Companies Act 1965 (repealed by the Companies Act 2016) ss 131B, 132(1), (1A), 166A, 167, 167A, 168, 169, 169(16), 169A, 169B, 170, 171, Part VI, Division 1
Companies Act 2016 s 251, Part III, Division 3
Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 51A, 154, 156, 316, 422
Evidence Act 1950 ss 145, 155(c)
Federal Constitution art 152
National Language Acts 1963/1967 s 8
Securities Industry Act 1983 (Capital Markets and Services Act 2007) ss 122(1), 122B, 122B(b)(bb), 122C(c)

*SK Thong (FK Lim and SC Chan with him) (Thong Seng Kong & Assoc) for the plaintiff.*
*Aimi Khalida bt Mohd Puzi (Mageswari with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the defendant.*

**Mohd Nazlan J:**

INTRODUCTION

**[1]** This is an appeal against the conviction recorded and sentence meted out by the sessions court against the accused (the appellant herein) for an offence of abetting another who had knowingly permitted the making of a misleading statement to the stock exchange under s 122B(b)(bb) of the Securities Industry Act 1983 ('the SIA') read together with s 122C(c) of the same Act.

**[2]** At the conclusion of the hearing of the appeal, I delivered my decision to allow the appeal, and highlighted the principal grounds for the same. This judgment contains the full reasons for my decision.

A KEY BACKGROUND FACTS

*The charge*

B **[3]** The prosecution, led by the Securities Commission ('the SC') had preferred the following one charge (exh P1) against the appellant:

> That you on 28 April 2005, at Bursa Malaysia Securities Bhd (Company No 635998-W), Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, abetted United U-Li Corporation (Company No 510737-H), who had knowingly permitted the making of a misleading statement to Bursa Malaysia Securities Bhd relating to the affairs of a listed corporation which is United U-Li Corporation Bhd, which misleading statement is contained in page 15 of United U-Li Corporation Bhd Annual Report and Financial Statements for the year ended 31 December 2004 and the misleading statement is underlined in red in the appendix to this charge, which offence was committed as a result of your abetment and you have thereby committed an offence under section 122B(b)(bb) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 122B of the same Act.

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*The main parties*

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**[4]** United U-Li Corp Bhd ('ULC') was at the material time an investment holding company which shares were listed on the main board of the local stock exchange, Bursa Malaysia Securities Bhd ('Bursa Securities'). ULC Group essentially features apart from ULC, its six wholly owned subsidiaries involved in the business related to the manufacturing of cable support and integrated ceiling systems.

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**[5]** United U-Li (M) Sdn Bhd ('ULM') was ULC's main subsidiary. It then contributed in the region of 80% of ULC Group's revenue.

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**[6]** The appellant is an accountant with the audit firm Roger Yue, Tan & Assoc. The audit firm was the external auditor for the ULC Group at the material time ('external auditor'). The appellant was the partner who was actively responsible for the statutory audit of the ULC Group for the financial year ended 2004.

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THE SALIENT FACTS OF THE CASE

I **[7]** There are some detailed background information forming the factual matrix of the case, as documented in the appeals record. For the purpose of this judgment however only those I consider essential to facilitate better appreciation of the reasoning behind my decision would be narrated.

**[8]** The duty of the external auditor in this case was principally to audit ULC Group's financial statements based on the approved accounting standards in Malaysia, and in line with the Companies Act 1965, before submission of the same to Bursa Securities, as stipulated under the Main Board Listing Requirements ('Listing Requirements') which govern listed entities.

**[9]** The charge against the appellant, as set out earlier, under s 122B(b)(bb) of the SIA read together with s 122C(c), was preferred on 28 April 2009 at the Kuala Lumpur Sessions Court, and primarily asserted that the appellant had abetted ULC who had knowingly permitted the making of a misleading statement to Bursa Securities.

**[10]** It is important to note that the misleading statement is the figures on the profit before taxation for ULC Group for the financial year ended 31 December 2004. The figures, stated to be RM18,909,167, were included in the annual report and financial statements of ULC for the year ended 31 December 2004. These annual report and financial statements (exh P4) were subsequently approved by the board of directors of ULC on 19 April 2005 to be submitted and announced to Bursa Securities, which was done on 28 April 2005.

**[11]** As required by the Listing Requirements, prior to the board of directors' meeting, the said annual report and financial statements for the year ended 31 December 2004 had also been tabled to the audit committee of the board of ULC on 18 April 2005. The audit committee at the meeting resolved to recommend the annual report and financial statements be submitted to the board of directors of ULC for approval.

*Essence of the contentions of the parties*

**[12]** The overarching case of the prosecution, as presented at the trial court and repeated in this appeal is that the Annual Report and Financial Statements for the year ended 31 December 2004, which as required for a holding company like ULC, represented a consolidated financial statement consisting all the accounts of parent ULC's subsidiaries, including, and especially ULM, contained a misleading statement in that the profit before taxation for ULC was inflated by RM4m.

**[13]** The higher profit figure was contended to be a direct consequence of the reduction in the accounts of ULM of the amount of purchases by the same figure of RM4m, which was subsequently consolidated into the accounts of ULC. And the assertion was that the inclusion of RM4m into the accounts of ULM was the product of a purported RM4m sales by ULM to three companies which never occurred.

**[14]** These sales were fictitiously recorded to have been made from ULM to Rasah Jaya Engineering (as evidenced in sales invoice, exh P14 and delivery order, exh P17), Poly Installation & Contracting Sdn Bhd (P15 and P18), and Boon Sang Electrical (M) Sdn Bhd (P16 and P19), in aggregate amounted to RM 4m, all purportedly having taken place in financial year 2004. In fact these three firms did not even exist, as records in the Companies Commission of Malaysia confirmed. These fictitious sales were also confirmed by an investigative audit performed by the audit firm BDO Binder ('BDO') who had been appointed by ULC in 2006 to investigate the same.

**[15]** These fictitious sales made into the accounts of ULM by way of a journal entry with a Reference Number JB12/04/43 (exh P40A) and was only recorded after the financial year ended 31 December 2004 even though the dates of the purported sales were between July and December in the year 2004.

**[16]** In simple terms the journal entry was performed by the debit of trade receivables for a total amount of RM4m, and a corresponding credit purchases for the same amount. This automatically rendered a reduction of purchases by RM4m, resulted in less spending in ULM's costs of sales, and thus led to the increase in profit by RM4m, as recorded in the income statement, being part of the annual report and financial statements of ULC.

**[17]** It was in evidence that when the account of trade receivables was debited with RM4m, the assets of the company increased by that amount considering that this RM4m was an amount owing to the company. Trade receivables is considered as a current asset of the company as is so stated under the company's balance sheet. But the entry of crediting purchases was wrong as the correct entry for sales made by ULM should have been, firstly, to debit trade receivables for a total amount of RM4m, and secondly, to credit sales for a total amount of RM4m.

**[18]** The actual profit before tax of ULC in the financial year ended 2004 excluding the fictitious RM4m transaction ought rightfully have been RM14,909,167 instead of the misleading figure of RM18,909,167. In the subsequent financial year of 2005 however, another fictitious set of documents were created in the form of purchase invoices and delivery orders which set off this RM4m sales to the three companies.

**[19]** Thus the debt to ULM supposedly created by the sales in 2004 was dealt with by ULM purchasing materials from the same three companies, for the same total amount of RM4m, without any payments actually made to settle the fictitious sales of RM4m.

**[20]** The prosecution charged that the appellant, the auditor from the

external auditor actually responsible for auditing ULC's financial statements for the financial year ended 31 December 2004, abetted the commission of the offence by ULC which had permitted the making of a misleading statement to Bursa Securities. The appellant was contended to have intentionally aided ULC given his full knowledge on the matter throughout the episode.

**[21]** For one it was asserted that the appellant knew that the consolidated account contained an untrue statement given a particular occasion in February 2005, during the period of the statutory audit of ULM and ULC performed by the external auditor. This was when the finance manager of ULM ('PW12') had provided the consolidated accounts of ULC to the appellant for his review at the instruction of ULC's managing director ('DW2'). PW12 was not a qualified accountant and DW2 was the person PW12 reported to.

**[22]** The appellant was said to have met DW2 at the latter's office and joined by PW12 who was then given a new set of consolidated accounts, which were different from the one PW12 submitted to DW2 earlier. This new set of consolidated accounts was thus used by PW12 and her staff for the preparation of the unaudited financial statements of ULC which were eventually announced to the stock exchange. At this point of time, no supporting documents were furnished to substantiate the difference between the two.

**[23]** It was also claimed that no audit work conducted on the sales to the three companies for these three fictitious companies were never selected for any verification work although they fell under the approved criteria of audit methodology for field audit work which required selection of debtors owing more than RM400,000.

**[24]** Further, when the issue of stock pilferage and fictitious invoice were raised at the meetings of the board of ULC on 27 February 2006, 29 March 2006 and 26 April 2006, the appellant, who was present did not say that he had done verification works on those transactions. Instead only when the board started to investigate later did the appellant claim that no audit verification work was done due to change in methodology.

**[25]** In addition, neither did the audit working files as seized by the SC show the adjustment made to include the fictitious sales amounting to RM4m. They instead recorded that there were sales to these three companies without showing that the transactions for sales were only recorded after the financial year ended 31 December 2014 as adjustments to the accounts of ULM.

**[26]** Given that the audit working file showed no adjustment of RM4m but reflected instead as if the RM4m was inclusive of the management account, it cannot arguably be stated that any verification was done by the appellant to

satisfy himself that the adjustment of RM4m was appropriate. The documents showing adjustments and the non-existence of the three debtors were instead removed and kept by the appellant in his office's drawer.

**[27]** It was also alleged that the appellant refused to allow investigative auditors to view the audit working file by stating that the audit working file was in the store room although a request to view them was made earlier before the meeting.

**[28]** And it is undeniable that the appellant, representing the external auditor was fully accountable for the audit work and findings, including responsible for having presented the audited financial statement to the audit committee at its meeting on 18 April 2005 which recommended approval of the same by the board of directors of ULC the day after. PW11, as the signing partner for this audit work on behalf of the external auditor signed off the financial statements of ULC for the financial year ended 31 December 2004. PW11 testified that no issues were raised for the financial year of 2004 and the material issue of fictitious sales was only raised for the financial year of 2005.

**[29]** It is not disputed that the announcement of the annual report and financial statements of ULC for the financial year ended 31 December 2004 (exh P) was submitted and announced to Bursa Securities on 28 April 2005. The audit committee of the board recommended the same on 18 April 2005, and the board of directors of ULC gave its approval on 19 April 2005.

**[30]** The managing director, James Lee Yoon Wah (DW2) attended both meetings, and PW12 the finance manager testified that she had at all times reported and asked for instruction from DW2 in relation to the financial statements of ULC. It is the case of the respondent that DW2 knew about the fictitious invoices, that the financial statements of ULC were as a result misleading but he did not prevent them from being approved by the board and released to Bursa Securities.

**[31]** That was why, according to the respondent, DW2 had been offered by the SC and paid a compound on 3 December 2008 for committing an offence under s 122B of the SIA as he, being the managing director and CEO of ULC, had knowingly permitted the making of a misleading statement in ULC's annual report and financial statements for the year ended 31 December 2004 to Bursa Securities, the subject matter of the charge in P1. And the appellant as the auditor abetted the commission of that offence by ULC as represented by DW2.

**[32]** The appellant on the other hand in his defence maintained that he never handed over any revised consolidated accounts of ULC to PW12 in the

meeting with DW2. DW2 himself could not remember if the appellant did that. Further the appellant claimed that he and DW5 had done verification work on the three companies and the RM4m transaction. DW5 testified to the same effect in that she had sent debtors' confirmations to the three companies and also performed subsequent receipt test since there was no response on the debtors' confirmations by end of March 2005.

**[33]** Furthermore the appellant explained that he informed BDO that he had not conducted any audit verification on the RM4m transactions because there was a change in audit methodology wherein samples were collected from companies with lower amount of sales.

**[34]** In short, the appellant asserted that he was not aware of any misleading information in ULC's audited annual report and financial statements for the financial year ended 31 December 2004, and there was nothing wrong in the adjustment made which was to debit trade receivables and credit purchases.

**[35]** There were also other matters concerning the event leading up to the finalisation of the audit and accounts, which however the prosecution countered were mostly afterthoughts on the part of the appellant, since these were not put to the prosecution witnesses during their cross examination at the prosecution stage. Some of these relied on the evidence of DW5 (see below), whose testimony was however impeached by the learned trial judge. On this, the prosecution highlighted that her testimony on verification works must be carefully evaluated since, according to the prosecution, DW5 conveniently omitted to state so in her statement to the investigating officer of the SC during investigation in 2007 and 2008 but could instead remember every minute detail many years later when she testified for the appellant in 2014.

## DECISION OF THE SESSIONS COURT

**[36]** The trial began on 21 March 2011, and on January 2014, the sessions court ruled that the prosecution had proven a prima facie case against the appellant, and ordered that the appellant enter his defence. On 21 October 2015, the sessions court convicted the appellant on the charge at the end of the defence case and sentenced him to one year imprisonment and a fine of RM400,000 (in default, six months imprisonment). Among others, it was held that the defence was mere denial and afterthought considering that the defence that there was audit verification works done was never put to the relevant prosecution's witnesses.

**[37]** Dissatisfied, the appellant chose to exercise his right to appeal against the conviction and sentence. The execution of sentence has been stayed

pending the appeal filed by the appellant. Hence the instant appeal now before me.

LAW ON APPELLATE INTERVENTION

**[38]** In hearing this criminal appeal, I am mindful of the duty of this court as established by the governing statute and the applicable case law authorities and have therefore proceeded approaching the same accordingly.

**[39]** Section 316 provides for the duty of a court hearing an appeal from a subordinate court in the following terms:

> 316 Decision on appeal
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

**[40]** In the often quoted authority of the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as he then was) instructively made the following observation:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ Rep 207, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefore an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):
>
> ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow

Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *'the High Court should and will always give proper weight and consideration to such matters' as:*

(1) *the views of the trial judge on the credibility of the witnesses;*

(2) *the presumption of innocence in favour of the accused;*

(3) *the right of the accused to the benefit of any doubt; and*

(4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.*

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

In *Wilayat Khan v State of Uttar Pradesh* AIR 1953 SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that *in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end*; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

**[41]** The principles governing appellate intervention have also been

analysed and explained by the Court of Appeal in *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, where Mohd Zawawi Salleh JCA (as he then was) held:

> [13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is de novo review where the appellate court is not required to give deference to the rulings of the trial judge. Rather, it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163); *Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015, *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1). The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:
>
> (a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or
>
> (b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or
>
> (c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses' or
>
> (d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.
>
> [14] What, then, is the appropriate standard of review for the appellate court to apply in mixed question of fact and law? In our view, the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding.

**[42]** And the position concerning situations where appellate interference is warranted is further reiterated in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875, where Mohd Zawawi Salleh JCA (as he then was) stated thus:

> [4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task

of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

**[43]** With the above principles in mind, I now deal with the points of appeal raised by the appellant.

## EVALUATION AND FINDINGS OF THIS COURT

**[44]** There were many issues raised by the parties at trial, and some are understandably repeated in this appeal. For the purposes of this appeal however, I consider it sufficient, after having examined the record of appeal, to only in this judgment state the grounds raised by the appellant as well as other considerations which are deserving of greater judicial scrutiny and warranting appellate intervention.

*First issue — Whether the charge is defective*

**[45]** The appellant argued that the charge against him is defective because it does not follow the ingredients of the offence for which he was charged. Further, there was also discrepancy between the Malay ('BM') and the English versions of the charge.

**[46]** Section 122B of the now repealed Securities Industry Act 1983 reads as follows:

122B False reports to Commission, stock exchange or recognised clearing house.

A person who —

(a) with intent to deceive, makes or furnishes; or

(b) knowingly authorises or permits the making or furnishing of, any false or misleading statement or report to the Commission, a stock exchange or a recognised clearing house relating to —

(aa) dealings in securities;

(bb) the affairs of a listed corporation;

(cc) any matter or thing required by the Commission for the due administration of this Act; or

(dd) the enforcement of the rules of a stock exchange or the rules of a recognised clearing house,

commits an offence and is liable on conviction to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding ten years or to both.

**[47]** The English version of the charge, as set out earlier in this judgment, was accompanied by the BM version, also tendered by the prosecution, as follows:

Bahawa kamu pada 28 April 2005 di Bursa Malaysia Securities Bhd (No Syarikat: 635998-W), Bukit Kewangan, 50200 Kuala Lumpur dalam Wilayah Persekutuan, Kuala Lumpur, telah bersubahat dengan United U-Li Corporation Bhd (No Syarikat: 510737-H) yang telah secara sedar membuat pernyataan yang mengelirukan kepada Bursa Malaysia Securities Bhd berhubung dengan hal ehwal sesuatu perbadanan yang disenaraikan iaitu, United U-Li Corporation Bhd dan pernyataan yang mengelirukan itu terkandung di dalam 'United U-Li Corporation Bhd Annual Report and Financial Statement for the year ended 31st December 2004' pada muka surat 15 yang telah digariskan dengan merah di dalam lampiran kepada pertuduhan ini, dan kesalahan tersebut dilakukan akibat persubahatan kamu dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 122B(b)(bb) dibaca bersama seksyen 122C(c) Akta Perindustrian Sekuriti 1983 (Akta 280) dan boleh dihukum di bawah seksyen 122B Akta yang sama.

**[48]** Now, this BM version is actually the final version in that language which was amended by the prosecution. This final BM version had substituted the word 'membuat' for the original word 'memberi' as highlighted in the charge above.

**[49]** The appellant submitted that the keys words used in the charge would be that 'United U-Li Corporation Bhd (No Syarikat 510737-H) yang telah secara sedar memberi (membuat) pernyataan yang mengelirukan kepada Bursa Malaysia' which if translated into English would be 'United U-Li Corporation Bhd (No Syarikat 510737-H) who knowingly had furnished a misleading statement to Bursa Malaysia'. This much is pretty clear.

**[50]** The issue however is that whilst the principal act by ULC as stated in the charge (P1) in the BM version could be translated as 'knowingly furnished a misleading statement' the actual ingredient in s 122B of the SIA plainly include the words 'authorises or permits' as in 'knowingly authorises or permits the furnishing of a misleading statement'. This should have rightfully therefore be stated as in the BM version 'dengan pengetahuan memberi kuasa atau membenarkan untuk mengemukakan pernyataan yang mengelirukan'.

**[51]** In other words, based on s 122B, ULC must have authorised or permitted another person to furnish a misleading statement. Instead, in the charge itself, in its BM version, ULC itself is specified to have furnished the said statement. The appellant thus maintained that the act as envisaged in the charge is not an offence for it differs substantially from that is stipulated in the statute. As a result nor can the charge of abetment against the appellant be sustained vis a vis an offence which in the first place is strictly not valid or is unknown under the law.

**[52]** The respondent resisted this line of argument, contending instead that the charge in BM was also translated into the English language, which in respect of the latter, did use the words 'knowingly permitted the making of misleading statement' in the charge, therefore being consistent with the words of the statute.

**[53]** The respondent also argued that the appellant had not shown he was misled by any error and in any event the absence of the BM equivalent of the word 'permitted', namely 'membenarkan' also did not in any way occasion confusion or embarrassment on the appellant. This is because it was clear to him that the abetment charge against him was in relation to the misleading statements submitted to the stock exchange. After all, his defence was that he never knew about the misleading statement and that he had done proper audit verifications on the RM4m transactions.

**[54]** In any event, the respondent additionally contended that the situation in this case therefore is apt to invoke s 156 of the Criminal Procedure Code and reiterated that such shortcoming if any was immaterial and did not mislead the appellant.

**[55]** It is my judgment that the charge against the appellant in the BM version of P1 is clearly in error because it did not contain the translation of the BM words of 'permitted' or 'authorised' which are crystal clearly also ingredients of the offence under s 122B of the SIA. It is plain that the words 'secara sedar membuat' are not the same as 'knowingly permitting or authorising' the making of a misleading statement.

**[56]** In light of the discrepancy between the two versions, it must be mentioned that the National Language Act 1963, which has been enacted pursuant to the Federal Constitution, in s 8 clearly provides for the use of the National Language in the courts (see also the Court of Appeal decision in *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444). The BM version of the charge is a pre-requisite to any prosecution in view of the requirements of the mandatory provisions of art 152 of the Federal Constitution and s 8 of the National Language Act 1963/1967.

**[57]** In any event, the respondent did prefer before the trial court both versions of the charge. It even chose to amend the BM version. So this version cannot simply now be ignored.

**[58]** The omission on its part to include in the charge the requisite words as found in s 122B is all the more objectionable and puzzling at the same time as the respondent had already in fact amended the BM version once before, and that the appellant had given notice of what the defence considered to be a defect in the said charge. I cannot emphasise enough that although the English version of the charge in P1 did conform with the elements of s 122B, the refusal of the respondent to correct the BM version is especially perplexing, despite it having been amended previously.

**[59]** The appellant's counsel had informed on the need to get instruction from the client on 21 March 2011 when the amended charge was preferred, and the appellant had subsequently put on record that the charge was defective on 16 June 2011. The same was, according to the appellant, also captured in the CRT recording on that 16 June 2011, at 11.35am.

**[60]** Moreover, the appellant had later repeated this in his written submissions dated 21 October 2014 filed at the end of prosecution's case, as well as in the submissions dated 1 June 2015 filed at the end of his case. Yet, the issue was not addressed by the sessions court in its grounds of judgment.

**[61]** As a result the English version specified that the company, ULC had knowingly permitted the making of a misleading statement to Bursa Securities but the BM version differently stated that ULC itself had knowingly made the misleading statement to the stock exchange.

**[62]** But as for the BM version, it can certainly be argued that given the principal act by ULC as specified in the charge — of knowingly making the misleading statement, as opposed to knowingly permitting or authorising the making of one — is non-existent in law. This had given rise to an ambiguity to the appellant herein as the accused, because the act of abetment by the appellant cannot as a result be an offence as per s 122C(c) given that the

abetment must be in relation to the commission of an offence. The amended charge P1 — the official BM version — had caused confusion as to the actual ingredients in respect of which the appellant must defend against.

**[63]** The argument that such defect could be cured by s 156 of the CPC is in my view unsustainable. The fact that the appellant had earlier raised his concerns with the charge before the commencement of trial and again when the BM version was amended is of particular relevance. In the case of *Zulkiflee bin Mohd Dom v Public Prosecutor* [1997] 4 MLJ 161; [1997] 3 CLJ Supp 290 which considered the scope of s 156 of the CPC, the High Court stated that s 154 on the requirement of the manner of committing the offence must be stated in the charge will render a charge defective if an objection to its non-compliance is taken before the commencement of the trial while s 156 will not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section.

**[64]** In respect of s 156 however whilst an objection may be raised at any stage of the proceedings, in that case, it was also held that the question of whether the accused had been prejudiced in his defense by the defect in the charge ought to also consider the fact that the objection to the frame of the charge was not raised till a late stage of the proceedings. In contradistinction, the appellant, as the accused in this instant appeal had made known of the defect at a very early stage of the trial.

**[65]** The confusion arising from the defect is manifest even from the written submissions of the respondent in the sessions court where as highlighted by the appellant, the respondent had repeatedly referred to the abetment to be in respect of the offence of ULC making a misleading statement to the stock exchange (which appears to follow the charge in BM).

**[66]** This is despite the elements of s 122B specifically containing the words 'permitting or authorising' the making of the misleading statement which was accurately incorporated in the English version. Yet these submissions of the respondent referred to the erroneous formulation as contained in the BM version.

**[67]** The respondent in its submissions in the sessions court below asserted on various occasions that the appellant abetted ULC commit the offence of making a misleading statement to Bursa Securities. To refer only to two such assertions, one is found in p 86 where it was stated '… This is because the charge against the accused refers to the fact that company, U-Li who had made misleading statements to Bursa with the accused's assistance …'.

**[68]** Another is at p 90 which said 'The direct and indirect evidence together with the surrounding circumstances of the case showed that at all material times, it was the Accused who abetted U-Li in making a misleading statement to Bursa, which misleading statement was contained in the annual report and financial statements of U-Li for the year ended 31 December 2004'.

**[69]** On the one hand its submissions contain various references to what in effect was the formulation contained in the BM version of the charge which does not follow the language of s 122B of the SIA. Yet on the other hand the respondent now argued, as mentioned above, that the appellant's complaint against the defective charge in the official BM version was inconsequential because the English version reflected the exact wordings of s 122B. But the respondent's own submissions make assertions which were anchored on the BM version which has been found to be defective.

**[70]** Even in its grounds of judgment, specifically in paras 11, 14, 21 and 67, the sessions court had plainly stated that ULC 'had knowingly permitted the making of a misleading statement to Bursa' when addressing the issue of the managing director (DW2) accepting and paying for the compound imposed by the SC. Also therefore, erroneous. Yet the grounds did not touch anything about the submissions by the appellant on the charge being defective.

**[71]** An essential ingredient of the offence was after all omitted from the charge and in my view the appellant had been misled and prejudiced as a result. Both versions were referred to and they did not incontrovertibly contain identical elements. The appellant had to contend with more elements in the English version — which concern permitting or authorising, which are decidedly absent in the BM version, if I may add, even after the amendment.

**[72]** The difference is so glaring. The omission to state a clear ingredient of the offence under s 122B is conspicuously obvious. So which version of the charge should the appellant as the accused direct his attention to in order to mount his opposition to the prosecution, for there is undeniably only one charge of abetment for an offence under s 122B?

**[73]** It is now trite law that the failure relating to the framing of the ingredients of an offence in a charge is fatal. In the Federal Court decision in *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421 it was clearly ruled thus:

> [28] It could also be noted that the 'error' alluded to in s 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss 156 and or 422 of the CPC. *This is because where it*

*was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. Low Seng Wah v Public Prosecutor* [1962] 1 MLJ 107; [1961] 1 LNS 55, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s 321 of the CPC (since repealed) which provided that 'No judgment, sentence or order of Magistrate's court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence'. *Low Seng Wah v Public Prosecutor*, which was primarily decided under s 321, is no precedent on s 156 of the CPC'. (Emphasis added.)

**[74]** The formal charge in the BM version is defective. It misled and caused prejudice and confusion to the appellant because the defence had had to deal with the different versions of what was supposed to be the one and the same charge. It is fatal to the conviction and thus cannot be sustained.

*Second issue — Whether mens rea of the principal offence established*

**[75]** The defect in the charge further concerns another important aspect of the case of the prosecution. The prosecution specified that the company either itself made the misleading statement to the stock exchange as per the BM version or knowingly permitted the making of the same in the English version. Even if this discrepancy is not fundamental — which it is — there is a further ambiguity as to whether the mens rea of the principal offence of s 122B said in the charge to have been committed by the company, which is ULC, has been proven.

**[76]** The respondent took the stand that the guilty mind or knowledge of a company must refer to the directors or managers of a corporation as they are the directing mind and will of a company, without which, a corporation could not be said to have committed an offence. This much, I would readily agree.

**[77]** But it further argued that the directing mind and will of ULC was none other the managing director and CEO himself (DW2). DW2 attended the board of directors' meeting approving the said P4 (the annual report and financial statements), and knew the misleading statement contained therein, especially given his alleged role involving PW12, the finance manager and the appellant mentioned earlier, and that he did not prevent the submission by not informing the board of his knowledge. This was the one person whom the respondent identified as the directing mind and will of the company who could have stopped the approval and release but yet permitted the making of such misleading statement.

A **[78]** The respondent submitted that instead, DW2 remained silent and thus permitted the making of the misleading statement to Bursa Securities. The respondent also relied on the fact that DW2 accepted the compound offered by the SC and had paid off the same. This showed that he was responsible for the lapse. This according to the prosecution fell within the scope of s 122B of the B SIA.

**[79]** I have great difficulty reconciling this submission with the concept of management accountability of corporate directors under company law. The argument that it is not necessary for all nine members of the board to permit C the making of the misleading statement to the stock exchange is in my view, misconceived. The crux of the problem of the respondent's submission, accepted by the sessions court, is to equate the directing mind and will of ULC, a listed entity to that of DW2 alone. This line of argument is in my view, erroneous.

D

**[80]** The respondent stated in para 36 of its written submissions, and repeated at the appeal hearing when queried, that:

> Since ULC is a corporation, its criminal liability is therefore placed upon its E directors and officers, which in this case was the Managing Director and CEO, DW2. As Managing Director and CEO, DW2 was also the directing mind and will of ULC.

**[81]** In the first place it simply cannot be stated that the fact DW2 alone F having been offered by the SC and then accepted and paid the compound meant that ULC, a separate legal personality had knowingly permitted the making of a misleading statement to Bursa Securities. It is pertinent to emphasise that the SC did not offer payment of compound to ULC.

G **[82]** In fact it is crucial to note that there was no evidence that the company, in terms of all its nine directors had the requisite knowledge within the context of s 122B. The sessions court merely accepted the contention of the respondent that payment of compound by DW2 amounted to an admission of guilt by the company, ULC. This cannot be right.

H

**[83]** The charge — both versions — stated that the offence was committed by the company. At the risk of repetition, the BM version stated that the company knowingly made the misleading statement, and the English version said the company knowingly permitted the making of the misleading I statement. In both cases, it is the company which was accused to have committed the offence. That much is clear.

**[84]** Equally clear is that the approval of the annual report and financial statements which contained the alleged misleading statement was given by the

board of directors, comprising nine members, at the meeting held on 19 April 2005. The board at the same meeting also approved the submission of the annual report and financial statements to Bursa Securities.

**[85]** Yet there is no admission of guilt by ULC. Even the SC did not direct the compound on the company and there was no evidence to show all of its nine directors had the requisite knowledge of the misleading statement when deliberating and approving the annual report and financial statements.

**[86]** The fact that DW2 having paid the compound cannot simply be attributed or linked to whether the appellant had abetted ULC because the decision to approve the annual report and financial statements which contained the misleading statement was made by the entire board of directors and not by DW2 alone.

**[87]** The respondent sought to rely on the Court of Appeal case of *CGU Insurance Berhad v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1, in particular on the following passage of the judgment:

> [111] But difficulties do arise in the case of a non-natural person, such as a company, when it comes to ascertaining the state of its mind. Take the example already given. If intention, recklessness or other state of mind is the basis of liability, how do you determine that a company had the particular intention or recklessness? Unlike a human, a company has no mind the state of which can be determined with reference to its acts and omissions. It is to overcome this problem that the law has developed rules called the 'rules of attribution' whereby the state of mind of an officer of a company is attributed to the company. The simplest approach to the problem was that selected by Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624 where he said this:
>
> > A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at pp 713, 714. So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R v ICR Haulage Ltd* [1944] 1 All ER 691 to which we were referred this morning.

**[88]** This is an important ruling reiterating the rules of attribution in company law, which is that in essence the state of mind of the directors is the state of mind of the company because the former are the directing mind and will of the company.

**[89]** But *CGU Insurance v Asean Security Paper Mills Sdn Bhd* merely states that the knowledge of the company in criminal law is to be attributed to the directing mind and will of the company, which ordinarily is reposed in its directors. It cannot however be automatically concluded that the managing director of a company is the directing mind and will of the company. What about the other directors. Are they less accountable?

**[90]** The argument that DW2 was the directing mind and will of the company and the finding of the sessions court that his payment of compound (which was offered by the prosecution only to DW2 and not the company) for breaching s 122B satisfied the element of the charge (in the English version) that the company had knowingly permitted the making of a misleading statement to Bursa Securities is in my judgment entirely misconceived in the context of the instant case.

**[91]** I am not laying down a new proposition. I accept that the rules of attribution in company law continues to govern and provide answers to the question of the presence or absence of criminal intention or knowledge on the part of a company. I also agree as a general rule that a company may be convicted for an offence if the requisite criminal knowledge could be shown to be attributed to certain directors of the company. After all the reality is some directors or very few of them are more involved in the running of a company from most others on the same board of directors.

**[92]** However this case is one where the general rule cannot be applied. This is due to the nature of the misleading statement, more accurately because it was said to be incorporated into the annual report and financial statements of a company listed on Bursa Securities.

**[93]** In my view, and this does not originate from the submissions of the appellant, the subject of the misleading statement in this case which is contained in the annual report and financial statements (not to mention it is also an important piece of information therein) of a listed entity like ULC is in law capable only of being knowingly permitted to be made to Bursa Securities *in the context of s 122B of the SIA by the board of directors of ULC and no other.*

**[94]** As I have highlighted at the hearing and agreed to by the respondent, every quarterly release of unaudited financial results by any listed corporation to Bursa Securities must under the Bursa Securities Listing Requirements be

first approved by its board of directors. A listed corporation must release its unaudited financial statements to the stock exchange every quarter and its board of directors must approve the statements upon recommendation of its audit committee prior to the release to the stock exchange.

**[95]** I had directed the respondent to submit on this point and the respondent at a continued hearing maintained its stance that in order to prove that the company, ULC had knowingly permitted the making (and this is the formulation in the English version of the charge, incidentally) of the misleading statement to Bursa Securities in this case, the court should look at who was the directing mind and will of the company. Given the reasons stated earlier, the respondent identified DW2 and no other.

**[96]** Chapter 9 of the Listing Requirements of Bursa Securities sets out in Part K the obligation of listed companies in respect of periodic disclosures. Specifically, para 9.22(1) provides:

> A listed issuer must give the Exchange for public release, an interim financial report that is prepared on a quarterly basis (hereinafter referred to as 'quarterly report'), *as soon as the figures have been approved by the board of directors of the listed issuer*, and in any event not later than 2 months after the end of each quarter of a financial year. (Emphasis added.)

**[97]** In other words, a listed issuer must submit to the stock exchange for public announcement the quarterly financial report as soon as it has been approved by its board of directors, not later than two months after the end of each quarter. It is clear the rules require such financial reports must be submitted to the stock exchange every quarter, and that before the submission, the board of the company must first give its approval. I emphasise that the requirement is for the board of directors to provide its approval.

**[98]** The Listing Requirements specifically impose the approval responsibility with regard to financial reports on the directors. There are many other provisions in the Listing Requirements which impose certain duties on the listed companies instead of their boards of directors. I do not think I need to produce them here. The point is for financial reports — the most crucial piece of information about the health of any company, Bursa Securities found it fit, unsurprisingly, for the board of directors as the authority empowered to give its approval.

**[99]** If the rules did not specify the imposition of that accountability on the board in that context, it could technically be argued (albeit with little merit, see further below) that the board could decide to delegate the responsibility on financial reports to only one director or even any senior executive of the company.

**[100]** However, in its additional submission after further research the respondent highlighted that para 9.23 of the Listing Requirements which impose the obligation of submission of annual audited accounts and annual reports to the stock exchange within a period not exceeding four months from the close of the financial year does not however require or even mention that such annual audited accounts must be approved by the board of directors, unlike the submissions of the quarterly report. Paragraph 9.23 reads:

> A listed issuer must ensure that the issuance of the annual audited accounts and annual report by a listed issuer shall be as follows:
>
> (a) the annual report shall be issued to the listed issuer's shareholders and given to the Exchange within a period not exceeding 6 months from the close of the financial year of the listed issuer; and
>
> (b) the annual audited accounts together with the auditors' and directors' report shall, in any case, be given to the Exchange for public release, within a period not exceeding 4 months from the close of the financial year of the listed issuer unless the annual report is issued within a period of 4 months from the close of the financial year of the listed issuer.

**[101]** The respondent further asserted that during the material time in 2005, the Companies Act 1965 also did not specify the obligation that annual audited accounts must be approved by the board of directors of a company. The provisions relating to accounts and audit were found in Part VI and in particular, Division I, from ss 166A–171.

**[102]** And the respondent additionally submitted that in contrast, provisions relating to Accounts and Audit under the new Companies Act 2016, which are housed in Division 3 of Part III on management of company, specifically s 251 makes it a requirement for financial statements to be approved by the board of directors. Section 251 reads:

> (1) Financial statements shall be —
>
> (a) approved by the Board; and
>
> (b) accompanied with a statutory declaration by a director or where the director is not primarily responsible for the financial management of the company, by the person responsible in setting forth his opinion as to the correctness or otherwise of the financial statements and where applicable, the consolidated financial statements.

**[103]** On this basis, the respondent, representing the SC, submitted that it cannot be said that such obligation on the board of directors concerning the annual report and financial statements existed. There was no law during the material time in 2005 that put the obligation on the entire board of directors of

ULC to approve the annual audited accounts before they were submitted to Bursa Securities for announcement. The statutory obligation only existed after the introduction of the Companies Act 2016. The actual approval from the board of directors of ULC prior to the announcement to Bursa Securities of the company's annual report and financial statements was merely an internal process adopted by ULC as 'a matter of best practices'.

**[104]** I find it difficult to accept this construction of the Listing Requirements and the Companies Act 1965 by the respondent.

**[105]** Even though the respondent stated, correctly, that there is no specific requirement which states that the release of the annual report and financial statements should first be also approved by the board of a listed entity, in my view this could not have been the intention of the stock exchange. It defies logic for the board be made responsible for the contents and release of the quarterly financial statements but not the annual financial statements. In any event the final quarter report would have to be consistent with the annual consolidated statements since the final quarter report would complete the entirety of the four quarters resulting in the annual financial statements, this time audited.

**[106]** The annual report and financial statements are the statutory documents which must be table to the shareholders of the company at its annual general meeting. It is untenable to contend that the board of directors — what more of a listed company — cannot be held responsible for the contents and their release to the shareholders and the investing public via the platform of the stock exchange.

**[107]** And even though the respondent highlighted that there is a specific requirement in the new Companies Act 2016 that audited financial results must be approved by the board of the company, but that there was no similar provision in the former Companies Act 1965 which applied to this case at the material time, in my view the law even under the Companies Act 1965 already imposed the duty on the directors of the company to manage the company which must surely include the responsibility of reviewing and approving the most important statutory documents of an operating company, before tabling the same of stakeholders for information.

**[108]** I would readily make reference to the more pertinent s 131B of the Companies Act 1965 which codified this common law rule pursuant to the Companies (Amendments) Act 2007 which had been introduced to enhance the framework on the duties and powers of directors under the law. It is worthy of emphasis that s 131B states as follows:

> (1) The business and affairs of a company must be managed by, or under the direction of, the board of directors.

(2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.

Section 132 As to the duty and liability of officers.

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

(1A) A director of a company shall exercise reasonable care, skill and diligence with —

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

**[109]** The law vests the duty of management of the company in its directors, which must be discharged with reasonable care and diligence in the best interest of the company.

**[110]** Furthermore the duty on the preparation of financial statement was clearly and firmly imposed on the directors in Division 1 of Part VI of the Companies Act 1965 in any event. Surely they are responsible for approving the financial statements as well, before tabling them to the shareholders. Singling out one director when the law prescribes the requisite accountability on the entire board of directors in respect of financial statements is plainly contrary to the law on directors' duties, and may even encourage and allow directors, especially miscreants and unscrupulous ones, to offer unjustified excuses for dereliction of their statutory and fiduciary duties.

**[111]** As such in my view the subject matter of information said to be misleading in the charge in the instant case which pertained to the annual report and financial statements could only in the context of s 122B of the SIA be knowingly permitted to be made for release by the board of directors of the company concerned, in this case ULC.

**[112]** The respondent argued that the position taken by DW2 that he relied on PW12 on financial matters could not absolve him from having the director's responsibility, by referring to the High Court decision in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131; [2012] 7 CLJ 407 is not inaccurate. But for the similar reasoning nor, for argument sake, can the other directors of ULC disclaim any responsibility on the annual report and financial statements and instead place that burden on DW2 alone when the Listing Requirements and the Companies Act (1965 and

2016) impose such accountability on the accuracy and completeness of the financial statements on all directors. A

**[113]** For clarity I reiterate that it is not the case in all s 122B prosecution, reference to a company as the offender must necessarily mean the entire board of directors must be proved to be tainted with criminal knowledge. Not at all. The key is the type of information. As I have stated earlier, the misleading information in the instant case is contained in the annual report and financial statements. The law — in the form of the Companies Act 1965 and the Listing Requirements effectively made it mandatory for the board of directors to approve the contents of the annual report and financial statements before they could be sent to the stock exchange. B C

**[114]** Therefore, if the information is of a different type, for instance, a listed company's response to a market query from the stock exchange, where there is no such requirement under the Listing Requirements or companies legislation for such a response be first approved by its board of directors, and where the CEO or MD usually has the authority, after some degree of due diligence, to order the release of a reply (which for argument sake contained a misleading information) to Bursa Securities, it is unnecessary in a charge under s 122B against that company to show that it is in fact the board of directors which permitted the making of the reply to Bursa Securities. D E

**[115]** In any event, in the instant case, the board of directors of ULC did on 19 April 2005 deliberate on the annual report and financial statements (which contained the alleged misleading information) and approved the same. This is not merely a demonstration of the company subscribing to standards of best practices. Instead this is a clear requirement that is well understood by all listed companies governed by the stock exchange. And it bears repetition that the case of the prosecution did not contain any evidence that any other members of the board of ULC (apart possibly from DW2) who attended and approved the financial statements had knowingly permitted the making of the misleading statement to Bursa Securities. F G

**[116]** The whole board must discharge its responsibility on the company's annual report and financial statements not only because of the Listing Requirements and the specific provisions on audit and accounts contained in the Companies Act 1965. The directors, I reiterate, must ensure adherence to their statutory duty in the exercise of the management powers of the company, particularly having regard to the overriding provisions of s 132(1) and (1A) of the Companies Act 1965 referred to earlier. H I

**[117]** The respondent also introduced another argument in its additional submissions at the continued hearing. It is this. The respondent submitted that

A the offence of permitting the making of a misleading statement to Bursa Securities can also be done at any stage prior to the approval by the board. It was contended that given the words 'permitting or authorising' in s 122B and 'permitting' in the charge (but in the English version only) a person could be said to have permitted the making of misleading statement when he permits
B the misleading statement to go through the processes until it is finally approved and announced.

**[118]** Therefore, so the respondent argued, the act or liability of any person
C cannot be nullified by the reason that only the board of directors can approve the financial statements before submission to the stock exchange. Similarly, one cannot say that a company has not committed an offence because it is not only the board that permits the making of such misleading statements to Bursa Securities because there are also other officers involved in every step of the
D process which culminates in the release to the stock exchange.

**[119]** The respondent further argued that as a matter of fact, even when the board has approved the financial statements, the same would not be submitted and released to Bursa Securities until another officer of the company effected
E the actual submission of the same. The offence under s 122B of the SIA can never be committed just by the approval of a board but it instead starts from the preparation of the statement and ends when the company submits the same to Bursa for announcement.

F **[120]** This argument is circular and misses the point. A final product must of necessity and by definition include steps taken preparatory to and towards completion of the task to produce the desired outcome. That is a given. A non-performance in any of the earlier steps would not result in the final product. But in the context of s 122B the elements of relevance are the
G misleading statement and the submission of the same to the stock exchange. Can the person who is involved in the first stage in the preparation of the annual report and financial statements be regarded as a person who knowingly permitted the making of the misleading statement to the stock exchange? It seems far-fetched. Even with his part of the task fulfilled there can be no
H submission to the stock exchange before the subsequent stages have also been undertaken.

**[121]** The same applies to others involved in the entire process before the tabling of the annual report and financial statements to the board. Take the
I party responsible for the stage immediately prior to the board of directors' deliberation. This would be the audit committee of the board of ULC. Its recommendation is necessary before the annual report and financial statements can be tabled to the meeting of the board. But even if the committee does provide its recommendation for the approval of the board (which it actually did

in this case), if the board does not convene a meeting to deliberate on the annual report and financial statements for example, it cannot be said that the committee had knowingly permitted the making of the misleading information to the stock exchange.

**[122]** The pivotal consideration therefore is as to whether which party had knowingly permitted the making of the misleading statement to the stock exchange. It is obvious that it is only if the board of directors have approved the same can the annual report and financial statements be sent to Bursa Securities for public release. Without approval by the board of ULC, the company cannot release the same to the stock exchange. And the fact that ULC would need a staff to actually ensure the annual report and financial statements get transmitted to the stock exchange cannot reasonably to mean that staff was the one who also permitted the submission of the same. The internal legal authority within ULC upon which the annual report and financial statements can be made to be submitted to Bursa Securities is vested in the board of directors of ULC and no other.

**[123]** The respondent also argued that its construction is supported by the fact that s 122B of the SIA uses the phrases 'authorise' and 'permit' instead of 'approve'. The argument is that although they may mean the same in their plain ordinary meaning, legislature has deemed it fit to make it an offence under s 122B of the SIA when one authorises or permits and not 'approve' when the word 'approve' would ordinarily be used to refer to act of a board agreeing or consenting to a certain act.

**[124]** I think this is a mere play on semantics. Permitting, authorising or approving the release of the annual report and financial statements of ULC to the stock exchange can only be effected by the board of directors, in consonance with the accountability on them as imposed by the Listing Requirements and Companies Act 1965 in respect of the audit and the financial statements of the listed company.

**[125]** However the respondent in its own written submissions in a slightly different context has already argued that the words 'authorises' or 'permits' the making of misleading statement in the context of s 122B are almost synonymous, and could also mean 'approves', by relying on the High Court of Australia's case of *University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd* [1975] 133 CR 1, where Gibbs J for the apex court held:

> In the same way the question whether one person authorises another to commit an infringement depends upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases.

A The word 'authorise', in legislation of similar intendment to s 36 of the Ac, has been held judicially to have its dictionary meaning of 'sanction, approve, countenance'. *Falcon v Famous Players Film Co Ltd* [1926] 2 KB 474 at 491; *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at pp 489, 497; [1928] ALR 127. It can also mean 'permit', and in Adelaide Corporation v
B Australasian Performing Right Association Ltd 'authorise' and 'permit' appear to have been treated as synonymous. A person cannot be said to authorise an infringement of copyright unless he has some power to prevent it: *Adelaide Corporation v Australasian Performing Right Association Ltd* (40 CLR at 497–8, 503) Express or formal permission or sanction, or active conduct indicating approval, is not essential to constitute an authorisation.

C

**[126]** As such the attempt to draw a distinction between 'permit' and 'approve' in the context of s 122B is unsupported even by the authority cited by the respondent. In any event in my view there is no real distinction that can or
D should usefully be made in a charge relating to the approval granted by the board of directors, vis a vis the word 'permits'.

**[127]** In the absence of knowledge on the part of the all the directors of the board that they had at the 19 April 2005 meeting approved the release of the
E annual report and financial statements of ULC to Bursa Securities which contained the alleged misleading information, the charge of abetment against the appellant of the commission of that offence by ULC under s 122B cannot be sustained.

F **[128]** I also wish to clarify that if a certain director is said to be responsible, like submitted by the respondent vis a vis DW2 was in this case, that particular director could be singly charged under s 122B (present s 369 of the Capital Markets and Services Act 2007 (CMSA)) provided however s 122(1) was also invoked at the same time.

G

**[129]** This is because even though, as I have found, the other members of the board of directors may not be prosecuted in the absence of mens rea, due to the approving authority being vested in the entire board of directors, s 122(1) deems all directors to have committed any offence committed by the company.
H It reads as follows:

122 Offences by bodies of persons and by employees and agents.

(1) Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of
I the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Where a person who is an employee of another person contravenes any provision of this Act, the person for or on behalf of whom the employee is acting shall be deemed to have contravened such provision.

(3) Without prejudice to the generality of subsection (2), where any dealer's representative, fund manager's representative or investment representative contravenes any provision of this Act, the dealer, fund manager or investment adviser for whom the representative is acting for or on behalf of shall be deemed to have contravened such provision.

(4) For the purposes of this section 'officer', in relation to a director of a corporation, includes —

(a) a person occupying or acting in the position of director of the corporation, by whatever name called, and whether or not validly appointed to occupy or duly authorised to act in the position;

(b) a person in accordance with whose directions or instructions the directors of the corporation are accustomed to act; and

(c) if the corporation is incorporated outside Malaysia —

(i) a member of the corporation's board;

(ii) a person occupying or acting in the position of director of the corporation's board, by whatever name called, and whether or not validly appointed to occupy or duly authorised to act in the position; and

(iii) a person in accordance with whose directions or instructions the members of the corporation's board are accustomed to act.

**[130]** Section 367 of the CMSA contains identical provision to s 122(1) of the SIA.

**[131]** It is then incumbent upon that single director being prosecuted to disprove the presumption by showing due diligence or that the offence was committed without his consent. Reliance on s 122(1) does away with the need to charge all directors, depending on the exercise of prosecutorial discretion. In the case before me, instead of the compound offer, the prosecution could have decided to charge DW2 under s 122B if it felt it had sufficient evidence for that purpose. But that charge against DW2 could only be sustained if the prosecution also invoked s 122(1) of the SIA, as mentioned.

**[132]** Nevertheless, s 122(1) of the SIA could not have been invoked in a charge against the appellant because s 122(1) of the SIA merely concerned directors and officers of the company being charged. Like the present s 367 of the CMSA, it did not extend to agents like auditors of the company.

*Third issue — No abetment if there is no principal offence*

**[133]** In any event, there is another fundamental basis why the abetment charge against the appellant in this case is of doubtful validity. As has been shown, in the absence of the requisite mental element on the part of the directors, the charge plainly therefore cannot be proven.

**[134]** Even though this point was not raised by either the respondent or the appellant, I am mindful of the provision of s 122C of the SIA which states that a person commits the offence of abetment even if the offence being abetted is not committed as a result of the abetment.

**[135]** Section 122C stated thus:

> 122C Attempts, abetments and conspiracies.
>
> A person who —
>
> (a) attempts to commit any offence under this Act;
>
> (b) does any act in furtherance of the commission of any offence under this Act; or
>
> (c) abets or is engaged in a criminal conspiracy to commit (as those terms are defined in the Penal Code) any offence under this Act, whether or not the offence is committed in consequence thereof, commits such offence and is liable to the penalty for such offence.

**[136]** In this case before me however, the prosecution had chosen to prove the commission of the principal offence by framing the charge in the manner that was done, which clearly cannot be established, because it was defective by reason of the prejudice and confusion occasioned to the appellant on the issue whether or not the charge contained the word 'permitting' as per s 122B, as well as in any event unsubstantiated in the absence of proof of criminal knowledge.

**[137]** Furthermore there is also authority in the Court of Appeal decision in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 where it was held that unlike abetment which consists of instigation, if the abetment like in the case before me is in the form of intentional aiding, as indeed submitted by the respondent in its written submissions, the acquittal of the principal offender must result in the acquittal of the abettor.

**[138]** Gopal Sri Ram JCA (as he then was) in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* held thus:

> In the present case, it is clear that the prosecution relied upon the first limb of the section, namely, abetment by instigation. Indeed, the learned Deputy who responded to these appeals quite properly conceded that this was the position. The

offence of abetment, when it consists of instigation, constitutes a separate and distinct offence. Consequently, an abettor who instigates the commission of an offence or conspires to commit it, may be convicted of abetment, notwithstanding that one who is charged with the principal offence has been acquitted. It is otherwise, where the abetment consists of intentional aiding: in such a case, acquittal of the principal offender must result in the acquittal of the abettor'.

**[139]** In the instant case before me, the principal offender who is specified in the charges — both versions — to be the company, ULC was not even charged for the offence under s 122B and in any event, I say again, cannot be stated to have committed the offence in the absence of proof of mens rea of all of its board members.

**[140]** For completeness, I should add that the prosecution in similar situation in other cases at present where an auditor is argued to be responsible for the inclusion of any false statement in the financial statements of a listed entity may instead charge that auditor under for example s 320A of the Capital Markets and Services Act 2007 (CMSA) directly without having to invoke the abetment offence provision, for misleading a preparer of the financial statement into rendering the financial statements to be false or misleading.

**[141]** Section 320A of the CMSA reads as follows:

320A False or misleading financial statements of a listed corporation

(1) A person shall not influence, coerce, mislead or authorise any person engaged in —

(a) the preparation of the financial statements of a listed corporation or any of its related corporations; or

(b) the performance of an audit of the financial statements of a listed corporation or any of its related corporations,

to do anything which he knows or ought reasonably to have known may cause the financial statements or audited financial statements to be false or misleading in a material particular.

(2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be punished with imprisonment for a term which shall not be less than two years but not exceeding ten years and be liable to a fine not exceeding ten million ringgit.

*Fourth issue — Non-speaking judgment — Insufficient judicial appreciation of the evidence and the law*

**[142]** The one other problem with the judgment of the sessions court, as recorded in its grounds of judgment is that it is a non-speaking judgment. In the case of *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 the

Federal Court instructively held as follows:

> First and foremost, we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that they do not convey a 'speaking' judgment although the importance of this has been stressed in a number of decided cases. (See, for example, *Balasingam v Public Prosecutor* [1959] MLJ 193 (refd) per Ismail Khan J (as he then was) and *Murugiah v Public Prosecutor* [1941] MLJ 17 (refd) per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.
>
> It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v Public Prosecutor* [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169.

**[143]** The key complaint is that the judgment substantially followed the written submissions of the respondent.

**[144]** The respondent on the other hand submitted that there is no provision of the law that requires trial judges to write in one way or another, and that judges' grounds of judgment should simply be a reasoned judgment, which means the trial judge should give his reasons for his findings.

**[145]** The respondent made reference to the case of *Mohd Nazri bin Ismail v Public Prosecutor* [2015] 1 MLJ 319 where Court of Appeal did not regard the act of copying submissions wholesale in the judgment positively, and stated:

> [33] Learned counsel submitted that the learned judge had failed to judicially appreciate the entire case because at the end of the prosecution case Her Ladyship had, in her grounds of judgment, adopted large parts of the written submissions of the prosecution (see p 8 of learned counsel's written submissions). The learned DPP in his reply conceded that the learned judge had reproduced 20 pages out of 98 pages of the written submissions of the DPP in the court below. However, it is submitted that the learned judge did consider the submissions by both parties and having done so, agreed with the prosecution and adopted the written submissions of the prosecution. The learned DPP submitted that it is not wrong for the learned judge to reproduce parts of the written submissions of the prosecution when Her Ladyship agreed with the prosecution on any particular issue. It was further

submitted that despite the shortcomings in the learned judge's grounds of judgment, the evidence adduced by the prosecution is strong and no appellate intervention is warranted.

[34] Whilst we agree with the position taken by the prosecution in relation to the manner the grounds of judgment was written in this case, we are not to be taken as condoning the act of copying written submissions. We are of the view that it is highly improper for a judge to copy the written submissions of counsel wholesale, and without acknowledging the source. In the present case, it is patently clear in the judgment of the learned judge that the written submissions had been copied wholesale without acknowledgment.

**[146]** However, the emphasis by the respondent is that notwithstanding the disagreement on the approach, the fact that the grounds of judgment were a mere reproduction of the prosecution's submission cannot be a sole ground to quash the conviction where the case against the accused, like the appellant presently, had been proven beyond reasonable doubt. On this the Court of Appeal in *Mohd Nazri bin Ismail v Public Prosecutor* said:

[36] In the present appeal, we have carefully scrutinised the grounds of judgment of the trial judge and we agree with the learned DPP that, notwithstanding the copious reproduction of the prosecution's submissions in the grounds of judgment, on the evidence adduced, the learned judge would have come to the same finding ie that the prosecution has established a prima facie case against the appellant. We find ample evidence to support the finding of the learned judge that the appellant had custody, control and mens rea possession of the drugs and in invoking the presumption under s 37(da) of the Act. Thus on the totality of the evidence we find that the learned judge is correct to order the appellant to enter his defence. Having considered the defence and having re-examined the prosecution case, Her Ladyship found that the defence is an afterthought. We find no reason to disagree. Having perused the evidence we find that the defence had failed to rebut the presumption under s 37(da) of the Act. We find that the conviction is safe.

**[147]** Further, the respondent also argued that an appeal is a continuation of proceedings by way of rehearing such that this court may subject the evidence of the case to a critical examination and come to its own findings even though in the grounds of judgment, the trial judge did not make any specific findings on the issues raised by parties before him. Any lack of findings therefore, so the respondent asserted, is not a ground to quash a conviction in a case where the evidence against the accused person is strong enough to convict him.

**[148]** Thus the Court of Appeal in *Chukwudi Okonkwo v Public Prosecutor* [2018] MLJU 93 held as follows:

[22] However, we wish to reiterate that an appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical examination and come to its own findings even though in the grounds of judgment,

A the trial judge did not make any specific findings on the issues raised before him. In addition, in a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct — see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122.

B **[149]** Also, in the case of *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122 Sharma J had held as follows:

> It has been said there are no findings of fact and that the learned president has not given his reasons. It is undoubtedly desirable that the learned magistrates and the learned presidents should when writing their grounds of decision give their findings and the reasons for those findings. It has been suggested that it is mandatory on the part of the learned magistrates and the learned presidents to give such reasons. I have in one of the appeals held it to be so but it is not mandatory in the sense that failure to give such reasons would render the conviction void or turn the trial itself into a nullity. Sometimes the amount of work the magistrates have to cope with at a particular time may make it virtually impossible for them to write a well-dressed judgment, flawless as it were, for the benefit of the appellant's counsel. There may, of course, be cases where because reasons are not given it may become difficult for the appellate court to come to its own findings and where because of the lack of such reasons there may be a likelihood of injustice being caused to the accused. In such cases the appellate court can always order a retrial. I do not think this appeal could be allowed on that sole ground as suggested by the learned counsel for the appellant. It is not a case which calls for a retrial or where any court could have any doubt as to the guilt of the appellant. When the appellate Court is convinced, as I am in this case, that the conviction of the appellant was good and there is nothing to cast any shadow of doubt in the finding of guilt arrived at by the learned magistrate or the president, the court itself can deal with the matter as fully and as effectively even though the grounds of decision as appearing in the appeal record are found lacking in specific findings and the reasons for those findings. I cannot now ask the learned president to write out fresh grounds of decision to meet with the criticism levelled by the learned counsel for the appellant.

C D E F G

**[150]** In my judgment having scrutinised the grounds of judgment of the sessions court convicting and sentencing the appellant, the contention that the judgment of the sessions court is not a speaking judgment is far from lacking in merit. There is on the contrary much substance in this assertion. It plainly is not a speaking judgment. It lifted very many parts of the submissions of the respondent.

H

**[151]** It is readily obvious that having read the written submissions as incorporated in the record of appeal, the grounds of judgment of the sessions court was essentially, as asserted by the appellant, a cut and paste decision, adopting primarily the written submissions made by the prosecution at the end of its case, or again as validly stated by the appellant, a close replica of the

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submissions. It is not easy to find any parts of the judgment which were not actually copied from the prosecution's submission. The sessions court clearly had written its findings on that basis.

**[152]** The underlying concern is that the grounds of judgment contain extremely little analysis of the evidence. There is no meaningful mention of the facts and evidence of the accused in the grounds of judgment, not to mention the salient aspects that the sessions court considered as warranting attention, and this immediately raises the concern that the findings were made by the sessions court not on the basis of the evidence, but on the prosecution's submissions instead. There was in other words insufficient if not total absent of any judicial assessment of the facts and evidence of the case.

**[153]** This situation in my view justifies appellate intervention. Reliance by the respondent on *Mohd Nazri bin Ismail v Public Prosecutor* does not assist its position. This is not a question about non-attribution of sources or about lack of originality. It is about insufficient judicial appreciation of the facts and evidence resulting in a non-independent judgment. In fact the Court of Appeal in *Mohd Nazri bin Ismail v Public Prosecutor* clearly said:

> [35] We wish to refer to the case of *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357. In that case, the main question in the appeal before the Supreme Court of Canada was whether a trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submissions. We respectfully adopt the views as expressed in the judgment of the Honourable Chief Justice wherein he said, inter alia, as follows:
>
> > ... It may not be the best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.
> >
> > To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing. The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgment.
>
> His Lordship said further:
>
> > To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person appraised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.
>
> Thus the Supreme Court concluded that while it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not, without

more, permit the decision to be set aside. *Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside. (Emphasis added.)*

**[154]** Not only is there little analysis of the evidence. There is also a blatant reference to a section of the applicable legislation which was entirely irrelevant to the case. This further suggests that to that little extent that the sessions court attempted to inject some form of independent analysis it got the law wholly wrong, implying its failure to appreciate the facts and evidence of the case to start with.

**[155]** A patent lack of the appreciation of the evidence and of the defence is often a ground for appellate intervention, as made clear by the case law outlined earlier in this judgment. A clear example of the non-appreciation of the facts and evidence by the sessions court was its judgment's express reference to the application of s 122(1) of the SIA and the need for the appellant to rebut or disprove the presumption enacted therein when s 122(1) is actually totally irrelevant to the proceedings, because, as stated earlier, an auditor simply cannot come within the remit of s 122(1) which deemed only the directors and officers of a company to be committing an offence whenever the company is guilty of such an offence. An auditor is clearly neither.

**[156]** As such, by specifically invoking s 122(1) of the SIA in the finding of the sessions court, the appellant had been wrongly imposed with the heavier onus of disproving, which is on a balance of probabilities in order to rebut the presumption instead of the mere raising of a reasonable doubt in the case of the prosecution.

**[157]** The argument of the respondent that the mention by the sessions court of s 122(1) in its grounds of judgment was a mere unintentional error on the part of the learned trial judge and that the presumption under that s 122(1) was never actually applied against the appellant, is difficult to accept.

**[158]** Even though it was a one liner invocation of s 122(1) of the SIA, the sessions court did make a specific reference to it. The sessions court clearly fell into error in invoking s 122(1). This is a substantial miscarriage of justice.

**[159]** In *Harun bin Abdullah v Public Prosecutor* [1998] 3 MLJ 1; [1998] 3 CLJ 184 the Court of Appeal held, among others, that the imposition of a heavier standard of proof was an incurable misdirection, in the following terms:

> [2] To all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan*'s decision, must necessarily be 'beyond reasonable doubt'. More so when the amendment to s 180 of the CPC providing for

a prima facie standard of proof at the close of the prosecution case only took effect after 31 January 1997, and there is nothing in the amendment to give it retrospective effect. The standard of proof to be applied in the instant appeal, therefore, would be proof beyond reasonable doubt and not the prima facie test.

[2a] In the circumstances, in applying s 60(1) of the Act to the situation of this appeal, one can only conclude that the learned Sessions Court Judge had misdirected herself when she applied the prima facie test. And applying the more stringent 'reasonable doubt' test to the facts, it could only be concluded that the result would certainly not be the same, as, clearly, no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.

[3] Section 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. As the error committed by the learned trial judge in misdirecting herself on the standard of proof herein fell within both these classifications, it was incapable of rectification under s 422 of the CPC.

[3a] It ought also to be noted that, since this was a breach of an explicit provision of the CPC and of a principle of general importance in the administration of justice, it was an illegality, and not an error, omission or irregularity for which a finding, sentence or order could be reversed or altered s 422 of the Code. This is irrespective of whether such error, omission or irregularity has occasioned a failure of justice. Section 422 in effect cannot be applied for cases where the wrong standard of proof has been applied.

**[160]** Separately, even though I agree that the authorities have held that an appeal is a rehearing, and that an appeal court may subject the evidence to a critical examination and come to its own findings, in this case such examination could not in my view progress the case of the prosecution. I have already mentioned the sessions court's reference to a section of the law — s 122(1) of the SIA — which was wholly inapplicable to the charge in the case, resulting in an unnecessary and unfair imposition on the appellant of the burden to disprove the presumption of his commission of the offence following its own commission by the body corporate.

**[161]** It should be mentioned that this failure to properly appreciate the evidence is not unrelated to the first reason why I find the appeal meritorious. It has relevance to the finding that the charge was defective. This is because by applying the deeming provision in s 122(1) of the SIA (which should not have been done, and also not reflected in the charge), if ULC had committed an offence, then every director may be deemed to have committed the same offence unless it could be proved otherwise. The converse however is not true. If a director commits a crime (which was what the respondent was suggesting vis a vis DW2 alone), it is not the law that ULC ought to be deemed to have committed the said offence. Yet this is what the respondent in effect is trying to

convince the Court. And at the same time, as if the situation was not already confused, the grounds of judgment of the sessions court even mentioned the invocation of that s 122(1) of the SIA which was totally inapplicable to the charge, rendering the miscarriage of justice and prejudice to the appellant nothing less than near absolute.

**[162]** In addition, there are other issues. For instances, among others, the failure of the trial court to initiate impeachment proceedings against the main witness of the prosecution Chin Sook Fah (PW12) is untenable as was the impeachment of the defence witness DW5 erroneous. Incidentally, PW12 was present at the board meeting in question. She briefed the board on P4. The appellant was not present. On the totality of evidence it cannot be said that the conviction is safe.

**[163]** For there are doubts whether the sessions court Judge was correct in refusing to undertake an impeachment proceeding against ULC's finance manager, PW12 who had made two statutory declarations in the respective annual reports and financial statements for financial year ended 2004 for both ULC and ULM affirming to the true and fair view of the contents therein, which contradicted with her subsequent testimony during her examination in chief in court in this case.

**[164]** Her statutory declaration for ULC, in accordance with the provisions of s 169(16) of the Companies Act 1965 reads as follows:

> I Chin Sook Fah, being the officer primarily responsible for the financial management of United U-Li Corporation Bhd, do solemnly and sincerely declare that the accompanying financial statements together with the notes thereon, are in my opinion correct, and I make this solemn declaration conscientiously believing the same to be true, and virtue of the provisions of the Statutory Declarations Act, 1960.

**[165]** PW12 made the same declaration with regard to ULM.

**[166]** Yet in her testimony during examination in chief she stated that the consolidated account of ULC had been adjusted to include the RM4m, clearly acknowledging that she knew the accounts used for the preparation of the financial statements were not true. She even admitted to lying, on the pretext of following DW2's instructions. This plainly contradicts her earlier declaration, also made under oath.

**[167]** However despite the appellant moving the trial court to initiate an impeachment proceedings against PW12, the sessions court rejected the same.

**[168]** Apart from whether her evidence ought to have been impeached, this as

a result affected the analysis whether PW12 was an accomplice and whether her evidence was credible in the circumstances, when tested against the evidence given by the other witnesses. It cannot be emphasised enough that PW12 played the pivotal role in the preparation of the accounts, especially in light of her testimony that DW2 had asked her, allegedly after his meeting with the appellant, to include the allegedly fictitious RM4m profits into the consolidated annual report and financial statements of ULC subject to the charge.

**[169]** Secondly, the sessions court had also decided to initiate an impeachment proceeding against Ooi Ming Chu, the audit manager (DW5) which resulted in the ruling that her entire testimony could not be accepted as she was not a truthful witness. This concerned the finding of contradictions between her statement previously recorded by the SC and her subsequent testimony in court at trial.

**[170]** The respondent had sought to impeach DW5 on the premise of ss 155(c) and 145 of the Evidence Act 1950. These provisions state as follows:

> 145 Cross-examination as to previous statements in writing
>
> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.
>
> If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he made such statement.
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> 155. Impeaching credit of witness
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> The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him:
>
> (a) by the evidence of persons who testify that they from their knowledge of the witness believe him to be unworthy of credit;
>
> (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
>
> (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;
>
> (d) *(Deleted by Act A729: s 3)*

*Explanation* — A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives shall not be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

*ILLUSTRATIONS*

(a) *A* sues *B* for the price of goods sold and delivered to *B*. *C* says that he delivered the goods to *B*.

Evidence is offered to show that on a previous occasion he said that he had not delivered the goods to *B*.

The evidence is admissible.

(b) *A* is indicted for the murder of *B*.

*C* says that *B*, when dying, declared that *A* had given *B* the wound of which he died.

Evidence is offered to show that on a previous occasion *C* said that the wound was not given by *A* or in his presence.

The evidence is admissible.

**[171]** The respondent then referred to the court, after the examination in chief of the witness a copy of the statement recorded from DW5 and a copy of the notes of proceedings recorded by the court for the date 2 September 2014. The statement was shown to the sessions court but only the seven impugned parts in the statement were revealed to the court. The document and the notes were not extended to the appellant.

**[172]** The sessions court ruled that that there were material contradictions in all seven parts and allowed the impeachment proceeding to be carried out against the appellant. During that proceeding, DW5 provided her explanation and the sessions court provided the ruling at the end of the case which rejected the entirety of her testimony.

**[173]** However it was undeniable that the respondent did not even extend a copy each of the statement and the court notes for the review of the appellant. The appellant in fact played no part in the impeachment proceeding, raising concerns that this would substantially prejudice the accused.

**[174]** Further, as highlighted by the appellant, in the case of *Re Wee Swee Hoon; Lim Ah Moy & Anor v Ong Eng Say* [1953] 1 MLJ 123 it was held that even in the circumstances when a party knew that the answers given by his own witness were in conflict with a statement of his previously made, then counsel should hand over a copy of the statement to the court and apply for leave to cross-examine him with the other side additionally being given the opportunity to see the document.

**[175]** Thus the appellant asserted that if a case of cross examining one's own witness would already demand the previous statement to be furnished to the other side, then it would be even more compelling in an impeachment proceeding for the opposite party to be able to view the previous statement of the witness, or like DW5 herein.

**[176]** It was observed that the respondent only brought to the attention of the witness DW5 the contents of the respective parts of the statements for her to explain whereas the requirement of s 145 as explained by the leading case on this subject — *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 was for the two conflicting versions to be carefully explained to the witness, preferably by the court, and that the witness must be afforded a fair and full opportunity to explain the difference.

**[177]** It would be remiss of me not to set out the key process as enunciated by Taylor J in *Muthusamy v Public Prosecutor*, as follows:

> The proper way to apply the sections is this. On the request of either side, the Court reads the former statement. If there is no serious discrepancy the Court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.
>
> Differences may be divided into four classes:
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> (a) Minor differences, not amounting to discrepancies;
>
> (b) Apparent discrepancies;
>
> (c) Serious discrepancies;
>
> (d) Material contradictions.
>
> Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.
>
> If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say at once 'The difference is not such as to affect his credit' and hand the statement back.
>
> If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the Court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the

matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.

*If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the difference.* If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue. (Emphasis added.)

**[178]** Thus in *Pathmanabhan a/l Nalliannen & Ors v Public Prosecutor* [2013] 5 MLJ 867, as referred to by the appellant, the court stated that it had explained in detail more than 20 contradictions in the statement as against his testimony in court.

**[179]** In the instant case before me, as the copies of the documents were not shown to the witness (DW5), and the alleged contradictions not meaningfully explained to her, I cannot but agree with the submission of the appellant that a doubt existed as to whether she really understood the nature and circumstance of the same, more so when the appellant was not allowed to question her by way of re-examination with respect to the alleged omissions or to take part in the impeachment process.

**[180]** Another case which decided the necessity of bringing on record of the whole statement in court to show omission in an impeachment proceedings was the High Court decision in *Yusoff bin Sidin v Public Prosecutor* [1971] 1 MLJ 203 which relevant passage from the judgment reads:

A prosecution or defence witness cannot be merely asked whether he made a previous statement to the contrary to the investigating officer and the matter left there. That answer of the witness cannot be used as evidence. The only way in which the previous statement can be used is by *contradicting the witness by such writing* and this can be only by drawing his attention to such parts of the recorded statement as are intended to be used for the purpose of contradiction and allowing him an opportunity to explain any contradiction. Those parts of the statement which are used for contradicting the witness must be *proved and brought on the record*. Where, however, there is no direct contradiction between what is said to the police and what is said in court and the contradiction consists only in an omission, the said omission can be proved by bringing on record the whole of the statement given in court. Further, the statement of a witness cannot be used in court for the purpose of determining the weight to be attached to the testimony of the witness unless it has been proved by either the prosecution or the defence in accordance with the provisions of section 113(ii). If the procedure prescribed under section 145 of the Evidence Ordinance is not adopted and the witness's attention is not drawn to the written record, it cannot be used as evidence and the police officer cannot be asked about it. Cross-examination of the witness must be confined to the contradiction between the two statements and only those portions of the statements as have been

used to contradict the witness should form part of the judicial record. Other parts of the statement cannot be relied upon by either the prosecution or the defence in determining the guilt or innocence of the accused and should not be relied upon by the court.

**[181]** The appellant was not in the instant case permitted to take part in the impeachment proceeding. And during re-examination, the appellant could only concern his questions on issues raised by the respondent in the cross examination in the main trial. There was no opportunity for him as the accused in seeking to mount his defence effectively to question DW5 to clarify the said inconsistencies as contained in the statement and in the notes of proceedings.

**[182]** This was notwithstanding the position in law as emphasised in the case of *Safry bin Koboy & Anor v Public Prosecutor* [2000] 1 MLJ 656 by the High Court in the following terms:

> As to the allegation that the first appellant was not given a chance to clarify the alleged discrepancy, this court is of the view that the said allegation is clearly unsustainable in view of the evidence available at p 175 of the record of appeal. At that portion of the notes, *it could be discerned that the first appellant was re-examined by his counsel on the same subject matter pertaining to the alleged discrepancy and the first appellant was given ample opportunity to explain and clarify the discrepancy as indicated therein. There was no hindrance posed by the trial judge to the learned counsel for the appellants to seek the necessary clarifications from the first appellant and it was the said counsel's own volition to conclude the re-examination of the first appellant.* As such, the facts of the instant appeal could be easily distinguished from those in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232. (Emphasis added.)

**[183]** It should in any event be stated that issues relating to impeachment cannot be construed as purely procedural and curable under s 422 of the CPC or s 60 of the Courts of Judicature Act 1964 (see the Court of Appeal decision in *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; [2013] 4 CLJ 470).

**[184]** DW5 was the audit manager who was involved in the late adjustment procedure for RM4m — claimed to be a lengthy process — and the argument that her testimony in court was more detailed than her recorded statement to the SC was due to her recollection subsequent to her viewing the documents that had been delivered by the SC under s 51A of the CPC to the appellant from whom DW5 borrowed in anticipation of attending trial (which documents were not available her at the time of the statement taking by the SC earlier in time), does not seem unreasonable.

**[185]** Accordingly I reiterate that even though I agree that the authorities have held that an appeal is a rehearing, and that an appeal court may subject the

evidence to a critical examination and come to its own findings, in this case, such examination, as I have undertaken, could not in my view assist the case of the prosecution.

**[186]** To name only a few, the failure of the trial court to initiate impeachment proceedings against the main witness of the prosecution PW12 is in my evaluation untenable as was the impeachment of the defence witness DW5, erroneous. On the totality of evidence it cannot be said that the conviction is safe.

CONCLUSION

**[187]** In view of the foregoing reasons, I find that the conviction and sentence against the appellant cannot be sustained. The charge was defective for the failure to include a key ingredient of the offence under s 122B of the SIA, and for the absence of evidence of knowledge on the part of the directors, save for DW2, rendering a charge of abetment against the appellant untenable.

**[188]** In addition, the non-speaking judgment of the sessions court contained very little judicial analysis, and revealed considerable failure to appreciate the facts, evidence and the applicable law, which even on the basis of a rehearing could not result in a finding of a conviction which is ruled to be safe. All this more than justifies appellate intervention.

**[189]** It follows that it cannot be said that the charge against the appellant had been proven beyond reasonable doubt. The conviction and the sentence against the appellant therefore cannot be sustained and must be set aside. The appeal is allowed, and the appellant be acquitted and discharged from the charge.

*Appeal allowed, appellant acquitted and discharged.*

Reported by Ashok Kumar